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No. 822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

MORRIS GOTTHILF,

Petitioner.

—against—

BENJAMIN SILLS, MORTON SILLS and SILLS OF CAMBRIDGE, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

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The petitioner, Morris Gotthilf, again prays that a writ of certiorari be issued to review the final order of the New York Supreme Court, Appellate Division, First Judicial Department, entered in the office of the Clerk of the Appellate Division on September 20, 1962, unanimously affirming, without opinion, an order of the Supreme Court, New York County, entered in the office of the Clerk of New York County on March 26, 1962.

Opinions Below

The New York Court of Appeals rendered no opinion. Neither did the New York Appellate Division, First Department. The Supreme Court, New York County, rendered two memorandum opinions, one on February 15, 1962, reproduced at Appendix, *infra* p. 9, and a second on March 14, 1962, reproduced in Appendix II, *infra* p. 10. These opinions are not reported. The final order of the

New York Appellate Division, First Department, entered on September 20, 1962 is reproduced as Appendix III, *infra* pp. 11-12.

Jurisdiction

On April 1, 1963 this Court granted certiorari to review the judgment of the Appellate Division, First Department. *Gotthilf* v. *Sills*, 372 U.S. 957 (1963). But on November 18, 1963 this Court dismissed the petition as improvidently granted on the ground that the petitioner had not exhausted state court remedies in that he had not applied to the Appellate Division, First Department, for leave to appeal to the New York Court of Appeals upon a certified question. *Gotthilf* v. *Sills*, 375 U.S. 79 (1963). Mr. Justice Douglas wrote a dissenting opinion in which Mr. Chief Justice Warren and Mr. Justice Black concurred.

Thereafter the petitioner proceeded by an order to show cause in New York Court of Appeals on January 6, 1964 for an order amending the order of that court dated October 26, 1962 dismissing the petitioner's motion for leave to appeal, or the order of that court dated November 1, 1962 dismissing his appeal taken as of right, by giving him 20 days from the entry of the requested order to make a motion in the Appellate Division, First Department for permission to appeal to the Court of Appeals on a certified question of law. Alternatively, petitioner asked that such an order be entered pursuant to § 5514(a) of the new New York Civil Practice Law and Rules (CPLR).

Petitioner's order to show cause, in the alternative, came on for oral argument before the New York Court of Appeals on January 6, 1964. On January 9, 1964, the New York Court of Appeals denied petitioner's motion. Its denial is reproduced as Appendix IV, *infra* pp. 13-14. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Question Presented

Does § 764 of the New York Civil Practice Act, providing for body execution, as applied in the instant case simply to enforce collection of a debt, violate the due process clause of the Fourteenth Amendment of the United States Constitution?

Constitutional and Statutory Provisions Involved

1. United States Constitution, Fourteenth Amendment, § 1:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

2. New York Civil Practice Act, § 764:

> "*Issuance of execution against the person generally.* Subject to the exception specified in the next section, an execution against the person of a judgment debtor may be issued by the court or a judge or justice thereof, upon application by the judgment creditor, in a case where the judgment can be enforced by execution, as prescribed by section five hundred and four of this act, and where the plaintiff's right to arrest the defendant depends upon the nature of the action. The issuance of the execution shall rest in the discretion of such court, judge or justice. The application for the issuance of the execution may be made without notice, or with such notice as the court, judge or justice may direct, and shall be made by affidavit which shall set forth in detail the right of the party to the execution, the amount of the judgment, the amount unpaid, and the time when and place where the execution against the judgment debtor's personal property has been returned wholly or partially unsatisfied."

3. New York Civil Practice Act, § 504:

"*Enforcement of judgment by execution.* In either of the following cases a final judgment may be enforced by execution:

"1. Where it is for a sum of money in favor of either party; or directs the payment of a sum of money. * * *"

4. New York Civil Practice Act, § 826:

"*Right to arrest depending upon the nature of the action.* A defendant may be arrested in an action, as provided in this and the next article, where the action is brought for either of the following causes:

1. To recover a fine or penalty.

2. To recover damages for a personal injury.

3. To recover damages for an injury to property, including the wrongful taking, detention or conversion of personal property.

4. To recover damages for misconduct or neglect in office, or in a professional employment.

5. To recover damages for fraud, or deceit. * * *"

5. New York Civil Practice Law and Rule § 5514(a):

"*Extension of time to take appeal or to move for permission to appeal.*

(a) *Alternate method of appeal.* If an appeal is taken or a motion for permission to appeal is made and such appeal is dismissed or motion is denied and, except for time limitations in section 5513, some other method of taking an appeal or of seeking permission to appeal is available, the time limited for

such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise."

Statement of the Case

After a final judgment (which resulted from a mistaken default order) was docketed against petitioner, he took an appeal to the Appellate Division, First Department. It was unanimously affirmed without opinion. 15 A.D. 2d 458 (Dec. 7, 1961).

Thereafter Mr. Justice Abraham J. Gellinoff

> "Ordered, that execution be issued herein against the person of Morris Gotthilf, defendant herein, without notice to the said defendant."

Again petitioner appealed to the Appellate Division, First Department. Again it unanimously affirmed without opinion. 17 A.D. 2d 723, 212 N.Y.S. 2d 886 (Sept. 20, 1962).

Petitioner docketed an appeal as of right in the New York Court of Appeals on the ground that § 764 of the Civil Practice Act as applied in the instant case violated the Fourteenth Amendment's due process clause. Petitioner also filed a printed notice of motion for leave to appeal to the Court of Appeals supported by a printed affidavit of counsel and printed brief. This motion was pursuant to § 589, subdivision 3(b) of the Civil Practice Act.

The Court of Appeals dismissed the appeal docketed as of right and dismissed the motion for leave to appeal because "the order sought to be appealed from does not finally determine the action within the meaning of the Constitution." 12 N.Y. 2d 761, 234 N.Y.S. 2d 714, 186 N.E. 2d 563 (1962); 12 N.Y. 2d 792, 235 N.Y.S. 2d 379, 186 N.E. 2d 811 (1962).

On December 19, 1962 the petitioner filed a petition for a writ of certiorari in the United States Supreme Court. This petition was granted on April 1, 1963. *Gotthilf* v. *Sills*, 372 U.S. 957 (April 1, 1963).

This petition presented but a single question. As stated in the petitioner's petition as well as his subsequent brief, the question presented was:

> Does § 764 of the New York Civil Practice Act, providing for body execution, as applied in the instant case simply to enforce collection of a debt, violate the due process clause of the Fourteenth Amendment of the United States Constitution?

On November 18, 1963 this Court dismissed the petition as improvidently granted on the ground that the petitioner had not exhausted state court remedies in that he had not applied to the Appellate Division, First Department, for leave to appeal to the Court of Appeals upon a certified question. *Gotthilf* v. *Sills*, 375 U.S. 79 (1963).

Thereafter petitioner proceeded by way of an order to show cause in the New York Court of Appeals on January 6, 1964. Oral argument was had on that day. Petitioner requested relief in the alternative. He asked the New York Court of Appeals to resettle either its order of October 26, 1962, dismissing his motion for leave to appeal, or its order of November 1, 1962 dismissing his appeal taken as of right, by giving him 20 days from the entry of the resettled order to make a motion in the Appellate Division, First Department for permission to appeal to the Court of Appeals on a certified question of law. Alternatively, he requested the same relief under the new New York Civil Practice Law and Rules (CPLR) § 5514(a). The Court of Appeals on January 9, 1964 denied him relief, without opinion. The petitioner, Morris Gotthilf, has still not had his day in court.

REASONS FOR GRANTING THE WRIT

I.

The New York Supreme Court in applying §764 of the New York Civil Practice Act, providing for body execution, simply to enforce the collection of a debt, made this section as applied violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

On this point the petitioner would like to refer the Court to the statement in his previous petition for a writ of certiorari, for it was on that writ that this Court previously granted certiorari. *Gotthilf* v. *Sills*, 372 U.S. 957 (1963).

II.

Petitioner has exhausted all remedies available to him under New York law.

If petitioner had previously not exhausted his state court remedies, he certainly has done so now. He asked the New York Court of Appeals to resettle one of its previous orders for the purpose of giving him 20 days time from the entry of the resettled order to make a motion in the Appellate Division, First Department for permission to appeal to the New York Court of Appeals on a certified question of law. In a supporting affidavit his counsel set forth in haec verba the precise question upon which this Court had granted certiorari. Alternatively, petitioner asked for the same relief under CPLR § 5514(a).

Either way, the New York Court of Appeals had power to grant him relief.

Motions to resettle orders in the New York Court of Appeals, like motions to reargue appeals, may be made at any time. See Rule XX of the Court of Appeals Rules;

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Cohen & Karger, *The Powers of the New York Court of Appeals* 443 (1962); *cf. Fay* v. *Noia*, 372 U.S. 391, 395 n. 1 (1963).

The New York Court of Appeals also had the power to grant the petitioner's request for time to go to the Appellate Division, First Department for permission to appeal to the Court of Appeals on a certified question under the new CPLR § 5514(a). This section went into effect on September 1, 1963. Section 10003 of the new CPLR provides:

> "*Pending and subsequent proceedings.* This act shall apply to all actions hereafter commenced. This act shall also apply to all further proceedings in pending actions, except to the extent that the court determines that application in a particular pending action would not be feasible or would work injustice, in which event the former procedure applies. Proceedings pursuant to law in an action taken prior to the time this act takes effect shall not be rendered ineffectual or impaired by this act."

Nevertheless, the New York Court of Appeals, without opinion, on January 9, 1964 denied petitioner's motion.

CONCLUSION

Surely the petitioner has now exhausted his state court remedies. He still has not had his day in court. He is still seeking it. The instant petition for a writ of certiorari should be granted.

Respectfully submitted,

O. John Rogge
Attorney for petitioner
60 Broad Street
New York, New York

APPENDIX I

Opinion by Mr. Justice Gellinoff at Special Term

[New York Law Journal—February 15, 1962]

Motion after judgment pursuant to section 764 of the Civil Practice Act for the issuance of a body execution against the individual defendant will be held in abeyance as indicated herein. Plaintiffs recovered a money judgment against both defendants and the judgment has been upheld on appeal to the Appellate Division. Plaintiffs are entitled to execution of judgment pursuant to section 504 of the Civil Practice Act. The judgment, having been entered on a cause of action for fraud and deceit—upon which plaintiffs could have availed themselves of the provisional remedy of arrest, pursuant to section 826(5) of the Civil Practice Act—execution against the person may now be granted thereon. Section 764 of the Civil Practice Act is constitutional. There is not a sufficient showing that plaintiffs have waived their right to a body execution by including a cause of action upon which a body execution allegedly could not have issued, or otherwise. All other points raised by defendant were, or should have been, raised and presumably were fully reviewed, on appeal. That possible defenses were lost through alleged inadvertence or alleged negligence on the part of former counsel, is a collateral matter, as to which defendant may seek redress, as he may be advised. Although he appeals to the discretion of the court, defendant has neglected to bare completely his present financial status and future prospects, and to present any plan for payment of the judgment. The defendant will be granted an opportunity to do so by serving and filing an additional affidavit, as above indicated, on or before February 21, 1962. If no such affidavit is filed, or if the affidavit when filed does not appeal to the discretion of the court, the motion for the issuance of a body execution will be granted.

APPENDIX II

Opinion by Mr. Justice Gellinoff at Special Term

[New York Law Journal—March 14, 1962]

The defendant has not convinced the court of any meritorious ground for withholding the issuance of a body execution. Accordingly, the motion is granted. Submit order.

APPENDIX III

Order of Affirmance of Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 20th day of September, 1962.

Present:

HON. CHARLES D. BREITEL
Justice Presiding
" BENJAMIN J. RABIN
" FRANCIS L. VALENTE
" SAMUEL W. EAGER
" ARON STEUER
Justices

4987

BENJAMIN SILLS, MORTON SILLS and SILLS OF CAMBRIDGE, INC.,

Plaintiffs-Respondents,

—v.—

CHARGE-IT SYSTEMS, INC.,

Defendant,

and

MORRIS GOTTHILF,

Defendant-Appellant

Appendix III—Order of Affirmance of Appellate Division, First Department

An appeal having been taken to this Court by the defendant-appellant from an order of the Supreme Court, New York County, entered on the 26th day of March, 1962, granting plaintiffs' motion for an order directing the issuance of an execution against the person of defendant-appellant, and said appeal having been argued by Mr. O. John Rogge of counsel for the appellant, and by Mr. Hyman Jacobs of counsel for the respondents; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed with $20 costs and disbursements to the respondents.

ENTER:

VINCENT A. MASSI
Clerk

APPENDIX IV

Order of Court of Appeals Denying Motion to Amend Order

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Ninth day of January A.D. 1964.

Present:

HON. CHARLES DESMOND,

Chief Justice, presiding.

Mo. No. 28

BENJAMIN SILLS, MORTON SILLS, and SILLS OF CAMBRIDGE, INC.,

Respondents,

vs.

CHARGE-IT SYSTEMS, INC.,

Defendant,

and

MORRIS GOTTHILF,

Appellant.

A motion having heretofore been made herein upon the part of the appellant to amend (1) the order of this Court dated October 26, 1962 dismissing a motion for leave to

appeal, or (2) the order of this Court dated November 1, 1962 dismissing an appeal taken as of right, and after having heard O. John Rogge, Esq., in support of said motion and Hyman Jacobs, Esq., in opposition thereto, and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

A copy

[SEAL]

GEARON KIMBALL
Deputy Clerk